

BEFORE THE
GOVERNING BOARD
WHITTIER CITY SCHOOL DISTRICT
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

In the Matter of the Layoff of:

Vanesa Apodaca and other
certificated employees of the
Whittier City School District,

Respondents.

OAH Case No. 2012030056

PROPOSED DECISION

Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, heard this matter on April 11, 2012, in Whittier, California.

Aaron V. O'Donnell, Attorney at Law, represented Dr. Laurie Bruton (Bruton), Assistant Superintendent, Human Resources, Whittier City School District (District).

Kent Morizawa, Attorney at Law, represented Respondents Vanesa Apodaca (Apodaca), Xavier Diaz (Diaz), Virginia Franco (Franco), Janay Hamrick (Hamrick), Brian Hansen (Hansen), Bernadette Leeper (Leeper), Elizabeth Martel (Martel), Arlene Martinez (Martinez), Reagan Mikhail (Mikhail), Myra Orozco (Orozco), Hae Ok Ma Pyo (Pyo), Inez Robles (Robles), Merced Rodriguez (Rodriguez), Kristy Rosander (Rosander), Ginger Sparks (Sparks), and Michelle Vincent (Vincent), who are collectively referred to as Respondents.

Respondents Mary Dishigrikyan (Dishigrikyan), Gloria Jimenez (Jimenez), Susan Mun (Mun), Yvonne Spitzer (Spitzer), Stephanie Walton (Walton), and Alisa Zepeda (Zepeda), who are also included in collective references to Respondents, did not appear at the hearing.

The District has decided to reduce or discontinue certain educational services and has given Respondents notice of its intent not to reemploy them for the 2012-2013 school year. Respondents requested a hearing for a determination of whether cause exists for not reemploying them for the 2012-2013 school year.

Oral and documentary evidence, and evidence by oral stipulation on the record, was presented at the hearing, and the matter was submitted for decision.

FACTUAL FINDINGS

1. Assistant Superintendent Bruton filed the Accusation in her official capacity.
2. Respondents are certificated employees of the District.
3. On February 24, 2012, District Superintendent Dr. Ron Carruth (Carruth) provided written notice to the Governing Board that he recommended the termination of the services of 24 certificated employees for the 2012-2013 school year due to the reduction of particular kinds of services. Three of these individuals held less than one FTE, and the total FTE positions were 22.8.
4. On February 28, 2012, the Governing Board of the District (Governing Board) accepted Superintendent Carruth's recommendation and adopted Resolution Number R19, reducing or discontinuing the following services for the 2012-2013 school year:

<u>Service</u>	<u>FTE¹ Reduction</u>
Elementary Teaching Services	10.0
Middle School 6th Grade Multiple Subject Classroom Teaching Services	2.0
Professional Learning Community Coach Services	4.0
Elementary School Math Coach Services	1.0
Middle School Math Coach Services	1.0
Middle School Physical Education Teaching Services	1.0
Middle School Science Teaching Services	1.0
Middle School Language Arts Teaching Services	1.0
SDC Preschool Services	1.0
Community Day School Middle School Teaching Services	<u>0.8</u>
Total	22.8

5. On March 1 and 2, 2012, the District provided notice to Respondents that their services will not be required for the 2012-2013 school year due to the reduction of particular kinds of services. Respondents thereafter filed timely requests for hearing.

6. On or about March 26, 2011, the District filed and served the Accusation and other required documents on Respondents.

¹ Full-time equivalent position.

7. Respondents Diaz, Franco, Hamrick, Hansen, Martel, Mikhail, Pyo, Sparks, and Zepeda thereafter filed timely notices of defense, seeking a determination of whether cause exists for not reemploying them for the 2012-2013 school year. The District stipulated that all other Respondents who had not filed notices of defense and who had appeared at the hearing may participate in the hearing as respondents.

8. All prehearing jurisdictional requirements have been met.

9. The services set forth in factual finding number 4 are particular kinds of services which may be reduced or discontinued within the meaning of Education Code section 44955.²

10. The District seeks to reduce spending due to the loss or projected loss of approximately \$4 Million in State funding. The Governing Board's decision to reduce or discontinue the services set forth in factual finding number 4 is not arbitrary or capricious but is rather a proper exercise of the District's discretion in light of such potential loss of revenue.

11. The reduction of services set forth in factual finding number 4, in the context of potential revenue losses and the need to continue providing services to students if such losses materialize, is related to the welfare of the District and its pupils, and it has become necessary to decrease the number of certificated employees as determined by the Governing Board.

12. a. On February 27, 2012, the District received notice from a middle school math teacher that she was resigning her employment, effective the end of the 2011-2012 school year. The name of this employee was not included in the list of employees submitted to the Governing Board by Superintendent Carruth, set forth in factual finding number 3. There is no evidence that the Governing Board was informed about the resignation of this employee before its adoption of Resolution Number R19.

b. Resolution R19 contains the following language: "[W]HEREAS, in determining the amount of services to be reduced, the Governing Board has considered all assured attrition, including resignations and retirements offered on or before the date o[f] this Resolution, and the reductions identified above are necessary in addition to such attrition;" (Exhibit 1, at p. 1.)

c. Dr. Bruton testified that, consistent with the quoted language set forth in factual finding number 12.b., the resignation of the math teacher made it possible for the Governing Board to avoid reducing services by one additional FTE. However, Dr. Bruton did not refer to any specific discussion by the Governing Board about this employee and her testimony is insufficient to establish that the Governing Board even knew about the recent resignation.

² All further references are to the Education Code.

d. Despite the general language of Resolution R19, set forth in factual finding number 12.b., the evidence establishes that the Governing Board did not consider the resignation of the middle school math teacher as positively assured attrition. Superintendent Carruth recommended the reduction of 22.8 FTE certificated positions, and the Governing Board adopted a resolution that reduced particular kinds of services by 22.8 FTE. The resolution did not include the reduction or elimination of middle school math teaching services.

e. The District has not received any resignations from certificated employees subsequent to the adoption of Resolution R19.

13. a. On February 14, 2012, the Governing Board adopted Resolution R12, setting forth its tie-breaking criteria for employees with the same seniority date. The criteria are as follows, in descending order of priority: possession of a clear, professional, standard, or general teaching credential; possession of a preliminary teaching credential; possession of credentials, as prioritized by the Governing Board, which allow the teaching of English learners; possession of specified desired subject matter authorizations; possession of other teaching authorizations; possession of higher education degrees; the number of post-graduate education units; the longevity of the teaching credential; and, if ties still exist, the seniority ranking is to be determined by a random drawing.

b. The criteria are reasonable as they relate to the skills and qualifications of certificated employees.

c. Respondents did not challenge the District's application of the criteria.

14. Respondents Diaz and Pyo have the same first date of service in a probationary capacity, August 27, 2010, but by reason of application of the tie-breaking criteria, Respondent Pyo is senior to Respondent Diaz. Both hold preliminary single subject credentials in math. They were selected for layoff from the middle school math classes they are teaching this year because senior employees, displaced by reductions in the math coach positions, have greater seniority and were able to "bump" into Respondent Diaz's and Pyo's positions. Respondents Diaz and Pyo are certificated and competent to teach the middle school math class vacated by the resigning teacher discussed in factual finding number 12.

15. The District did not retain any certificated employee junior to any Respondent to render a service which Respondents are certificated and competent to render.

LEGAL CONCLUSIONS

1. Jurisdiction for the subject proceeding exists pursuant to sections 44949 and 44955, by reason of factual finding numbers 1 through 8.

2. The services listed in factual finding number 4 are determined to be particular kinds of services within the meaning of section 44955, by reason of factual finding numbers 4 and 9.

3. Cause exists under sections 44949 and 44955 for the reduction of the particular kinds of services set forth in factual finding number 4, which cause relates solely to the welfare of the District's schools and pupils, by reason of factual finding numbers 1 through 11.

4. The number of certificated employees to be given final layoff notice depends on the actual service reductions. As Section 44955, subdivision (b), states, "Whenever in any school year the average daily attendance in all of the schools of the district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two years, whenever the governing board determines that attendance in a district will decline in the following year as a result of the termination of an interdistrict tuition agreement as defined in Section 46304, whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, or whenever the amendment of state law requires modification of curriculum, and when in the opinion of the governing board of the district it shall become necessary by reason of any of these conditions to decrease the number of permanent employees of the district, the governing board *may terminate the services of not more than a corresponding percentage of the certificated employees* of the district, permanent as well as probationary, at the close of the school year. . . ." (Emphasis added.)

In *Moreland Teachers Association v. Kurze* (1980) 109 Cal.App.3d 648 (*Moreland*), a case involving reductions in force resulting from reductions in particular kinds of services as well as from declines in average daily attendance, the court concluded that the district was required to take into account all positively assured attrition in order to avoid unnecessary layoffs. The dispute in that case centered around a district's obligation to take into account the attrition that occurred between the time preliminary layoff notices were required to be issued, March 15th, and the time final notices were required to be issued, May 15th. The court stated: "A school board should not be required to allocate its resources based on projections or estimates. (*Degener v. Governing Board* (1977) 67 Cal.App.3d 689, 699.) However, we do not see this to be the result of subtracting all positively assured attrition occurring prior to the last date for giving final notices in calculating the number of layoffs needed for the following year. Acknowledging actual attrition occurring between March 15 and May 15 to reduce the number of employees to be laid off results in no prejudice to the school district, while sparing that number of employees unnecessary termination of employment. [¶] . . . [W]e see no legal or practical impediment to revising downward the number of needed terminations resulting from events occurring in the intervening two months. On the contrary, there is sound reason to do so, as otherwise the reduction in force for the ensuing school year would be greater than that necessitated by the decline in attendance. (See *Burgess v. Board of Education*, *supra*, 41 Cal.App.3d 571, 578-579.)" (*Moreland*, *supra*, 109 Cal.App.3d 648, 654.)

In *Lewin v. Board of Trustees* (1976) 62 Cal.App.3d 977, 988, a case which like *Moreland* involved layoffs based on a decline in average daily attendance as well as on reductions of particular kinds of services, the court cited the language of section 44955's predecessor, section 13447, as providing "that the governing board of a school district may reduce its staff of certificated employees due to a reduction in pupil attendance or reduction or discontinuance of a particular kind of service, but only in proportion to the reduction in attendance or services."

In this case, the Governing Board accepted its superintendent's recommendation to reduce the services of 22.8 FTE certificated employees, and utilized one of the methods authorized by section 44955, the reduction or elimination of particular kinds of services to do so. As a result of the Governing Board's action, 24 individuals, representing a total of 22.8 FTE, received notice that their services would not be required for the 2012-2013 school year.

As required by section 44955, subdivision (b), and *Moreland*, in order to avoid unnecessary layoffs, the number of certificated employees receiving final notices must be adjusted by any positively assured attrition to ensure a reduction of only the number of positions corresponding to the service reductions approved by the Governing Board. While the resignation of the middle school math teacher actually occurred before March 15, 2012, it was never considered by the Governing Board as positively assured attrition, as set forth in factual finding number 12. Accordingly, once the resignation of the math teacher is taken into account, one of the final notices of layoff is not necessary to achieve the desired 22.8 FTE reduction.

Relying on *San Jose Teachers Assn. v. Allen* (1983) 144 Cal. App.3d 627 (*San Jose*), the District argues that positively assured attrition need not be considered in cases involving the reduction of particular kinds of services. While the case so holds, its holding does not rest on a sound footing. In reaching its conclusion, the court noted that the quoted language of section 44955, subdivision (b), regarding corresponding reductions applies only to cases involving average daily attendance declines. However, as the plain language of the statute, quoted above, shows that the permissible termination of "not more than a corresponding percentage" results when layoffs occur by reason of "any" of the listed conditions, which include particular kinds of service reductions as well as declines in average daily attendance. The *Moreland* and *Lewin* courts recognized that final notices may only be issued to a number of employees that corresponds to the decline in daily attendance or to the reduction in services, as the case may be, and their analysis is consistent with the statutory language and is persuasive.

In any event, regardless of its view on positively assured attrition, the *San Jose* court recognized that the number of final layoff notices that may be issued depends on the actual level of service reductions. Thus, "A board's decision as to reduction or discontinuation of a particular kind of service is not tied to any statistical computation, such as reduction in the number of students. *The number of terminations made necessary by [particular kinds of services] reductions depends totally upon the district's decision as to how many services to*

reduce. Put another way, the language of section 44955 that the governing board of a school district ‘may terminate the services of not more than a corresponding percentage of the certificated employees of said district’ is only applicable to [average daily attendance] terminations based upon an actual reduction in attendance. Where the governing board determines to discontinue or reduce a particular kind of service, there is no way to calculate a ‘corresponding percentage,’ hence it is within the discretion of the board to determine the amount by which it will reduce a particular service.” (*San Jose, supra*, at 144 Cal. App.3d 635-636; emphasis added). Here, the number of terminations necessitated by the reduction in particular kinds of services is 22.8 FTE positions and such level of reductions, as opposed to 23.8 FTE positions, will be achieved taking the resignation into account.

5. Two Respondents, Diaz and Pyo, are certificated and competent, and are the most senior Respondents possessing such qualifications, to teach the middle school math class vacated by the resigning teacher, as set forth in factual finding number 14. Inasmuch as Respondent Pyo is senior to Respondent Diaz, she can take the full-time position vacated by the resigning middle school math teacher, and Respondent Diaz can be retained to perform the .7 FTE previously reserved for Respondent Pyo. Accordingly, cause does not exist to terminate the services of Respondent Pyo and cause does not exist to terminate .7 FTE of Respondent Diaz’s position.

6. Cause exists to terminate the services provided by Respondents Apodaca, Diaz (.3 FTE), Dishigrikyan, Franco, Hamrick, Hansen, Jimenez, Leeper, Martel, Martinez, Mikhail, Mun, Orozco, Spitzer, Robles, Rodriguez, Rosander, Sparks, Vincent, Walton, and Zepeda for the 2012-2013 school year, by reason of factual finding numbers 1 through 15 and legal conclusion numbers 1 through 5.

ORDER

1. The Accusation is sustained and the District may notify Respondents Apodaca, Diaz (.3 FTE), Dishigrikyan, Franco, Hamrick, Hansen, Jimenez, Leeper, Martel, Martinez, Mikhail, Mun, Orozco, Spitzer, Robles, Rodriguez, Rosander, Sparks, Vincent, Walton, and Zepeda that their services will not be needed during the 2012-2013 school year due to the reduction of particular kinds of services.

2. The Accusation is dismissed with respect to Respondent Pyo.

DATED:_____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings